United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1004
75-1008

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket Nos. 75-1004, 75-1008

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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Preliminary Statement

The United States petitions for rehearing, and respectfully suggests rehearing *en banc*, of a decision of a panel of this Court (Hays, Mulligan and Gurfein, *C.JJ.*), filed December 4, 1975, that withdrew the panel's opinion filed October 6, 1975 affirming Scansaroli's conviction, and reinstated the reversal of Scansaroli's conviction and remand for new trial contained in the panel's original decision of July 28, 1975.

Reasons for this Petition

The simple and single issue presented by the panel's most recent decision is whether an otherwise valid conviction can be appealed and reversed for an error that was neither plain error nor objected to below. It is an

issue that directly bears not only on the efficient administration of justice but also on the appropriate exercise of the power of this Court, and hence, as the panel's opinion itself seems to suggest, presents a "difficult question of appealability" appropriate for the "empanelling of an *en banc* Court." (Slip op. at 914 and 918). A brief recapitulation of the present procedural posture of this case places this issue in clear relief.

Following a four week trial in the United States District Court for the Southern District of New York before the Honorable Harold R. Tyler, Jr., United States District Judge, and a jury, appellants Natelli and Scansaroli were convicted of wilfully making and causing to be made false and misleading material statements in a proxy statement. Natelli and Scansaroli were certified public accountants employed by Peat, Marwick, Mitchell & Co. ("Peat") and had been, respectively, the engagement partner and audit supervisor for Peat's audit engagement by National Student Marketing Corporation ("NSMC") in and around 1969. The gist of the single-count charge against Natelli and Scansaroli* was that they had know-

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* The count charging Natelli and Scansaroli reads, in its entirety, as follows:

COUNT TWO

The Grand Jury further charges:

1. On or about September 27, 1969, in the Southern District of New York, defendants CORTES W. RANDELL, ROBERT C. BUSHNELL, DENNIS M. KELLY and BERNARD J. KUREK, as responsible officers of NSMC, and ANTHONY M. NATELLI and JOSEPH SCANSAROLI, as independent auditors of NSMC, unlawfully, wilfully and knowingly made and caused to be made false and misleading statements with respect to material facts as set forth in paragraphs 3 and 4 of this Count in a proxy statement for NSMC dated September 27, 1969.

2. Said proxy statement solicited approval by the NSMC shareholders of the issuance of additional shares of NSMC common stock and the approval of certain mergers, and was required

[Footnote continued on following page]

to be filed and was filed with the SEC pursuant to Title 15, United States Code, Section 78n(a) and Rule 14a-6(c) promulgated by the SEC thereunder.

3. Said proxy statement contained an "audited" statement of earnings for NSMC for the fiscal year ending August 31, 1968, which differed from a previous "audited" statement of earnings for the same period contained in an annual report to stockholders for that fiscal year. The difference was explained in the following footnote:

> "Net sales and earnings as originally reported to stockholders in the annual report [for the year 1968] and the amounts as shown in the statement of earnings in this proxy statement are reconciled as follows:

Net sales	
Originally reported	$ 4,989,446
Pooled companies reflected retroactively	$ 6,552,449
Per statement of earnings	$11,541,895
Net earnings	
Originally reported	$ 388,031
Pooled companies reflected retroactively	$ 385,121
Per statement of earnings	$ 773,152"

This explanatory note was materially false and misleading in the light of the circumstances under which it was made because, as the defendants well knew but failed to disclose, among other things: (a) approximately one million dollars, or more than 20% of the 1968 "net sales originally reported" had proven to be nonexistent by the time the proxy statement was filed and had been written off on NSMC's own internal books of account; (b) net sales and profits of "pooled companies reflected retroactively" were substantially understated; and (c) net sales and profits of NSMC were substantially overstated.

4. Said proxy statement also contained an "unaudited" statement of earnings for the nine months ended May 31, 1969 which stated "net sales" as $11,313,569 and "net earnings" as $702,270. These figures were materially false and misleading because, as the defendants well knew at the time the proxy statement was filed, "net sales" for that period were less than $10,500,000 and NSMC had no earnings at all.

(Title 15, United States Code, Sections 78ff, 78n; Title 18, United States Code, Section 2.)

ingly and wilfully participated with four NSMC executives (all of whom pled guilty to one or more charges in the Indictment) in making and causing to be made a false and fraudulent proxy statement that made NSMC appear to be highly profitable, when in fact it was losing money. The count specified two false assertions in the financial data in the proxy statement: the "footnote," which dealt with NSMC's financial condition in the prior fiscal year, 1968, and the "nine-months earnings statement," which dealt with NSMC's financial condition during the first nine months of the current fiscal year, 1969. The falsity of both specifications was the result of the same underlying fraudulent practice of booking as sales and earnings "commitments" that were little more than hopes and of failing to disclose that prior similar "commitments" had proven illusory.

The panel of this Court, in its first opinion filed July 28, 1975, found sufficient evidence on each specification to sustain Natelli's conviction* and held as to Scansaroli that there was sufficient evidence to sustain his conviction as to the first specification. However, the panel concluded that there was insufficient evidence to go to the jury on the second (nine-months earnings) specification. Because it could not determine whether the jury's verdict rested on the first specification, which the Court found to be sustained by the evidence, or on the second, which the Court found was not, the Court concluded as to Scansaroli that "there seems to be no alternative to remand for a new trial." (Slip op. at 5191).

The Government, however, petitioned the panel for rehearing, bringing to the Court's attention the established line of cases in this Circuit requiring that, to pre-

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* Natelli's subsequent petition for rehearing, with suggestion for rehearing *en banc*, was denied in all respects by this Court, and no issues relating to Natelli remain before this Court.

serve the point for appeal, a defendant must specifically ask a trial court to withdraw an insufficient specification from an otherwise sufficient count in order to give the trial court a chance to correct the error. *E.g.*, *United States* v. *Mascuch*, 111 F.2d 602, 603 (2d Cir.), *cert. denied*, 311 U.S. 650 (1940); *United States* v. *Goldstein*, 168 F.2d 666, 671 (2d Cir. 1948).* Since, as the Court

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* This Court, per Swan, C.J., held in *Mascuch*, 111 F.2d at 603:

> "Trial errors will not ordinarily be reviewed on appeal unless called to the trial judge's attention in order to afford an opportunity for timely correction. The appellant failed to ask the trial court to withdraw from the jury any specific assignment of perjury [in the multi-assignment counts]. Where such restricted submission is desired, it must be requested and refused to be available as an error to be urged on appeal. See United States v. Dilliard, 2 Cir., 101 F.2d 829, 833, certiorari denied 306 U.S. 635, 59 S.Ct. 484, 83 L.Ed. 1036; Claassen v. United States, 142 U.S. 140, 147, 12 S.Ct. 169, 35 L.Ed. 966. At the close of the government's case, and again at the close of all the evidence, the defendant moved for a directed verdict on each count. In arguing the motion it was urged that none of the assignments was proved, but we do not regard the motion as equivalent to a motion to withdraw from the jury a specific assignment of perjury, for the motion would properly be overruled if a single assignment in each count was supported by the evidence. See United States v. Otto, 2 Cir., 54 F.2d 277, 279. Therefore the only contention which the appellant is entitled as of right to urge upon appeal is whether there was sufficient evidence to support one assignment of perjury in each count, and not—as counsel argues—whether any assignment in either count should have been withdrawn from the jury."

See also, *e.g.*, *United States* v. *Dilliard*, 101 F.2d 829, 833 (2d Cir. 1938) (L. Hand, C.J.), *cert. denied*, 306 U.S. 635 (1939); *United States* v. *Smith*, 112 F.2d 83, 86 (2d Cir. 1940); *United States* v. *Koch*, 113 F.2d 982, 984 (2d Cir. 1940); *United States* v. *Kushner*, 135 F.2d 668, 672 (2d Cir.), *cert. denied*, 320 U.S. 212 (1943); *Doan* v. *United States*, 202 F.2d 674, 679 (9th Cir. 1953); *United States* v. *Roth*, 237 F.2d 796, 800 (2d Cir. 1956) (Clark, C.J.), *aff'd*, 354 U.S. 476 (1957).

found (after receiving responding papers from Scansaroli), Scansaroli "did not move to dismiss the specification for insufficiency" (slip op. at 6298), the Court, in its second opinion filed October 6, 1975, reconsidered its former determination and affirmed the conviction of Scansaroli.

Scansaroli then petitioned for rehearing, with suggestion for rehearing *en banc*. Although the panel did not permit the Government to answer the petition,* on December 4, 1975 the panel filed a third opinion, which once again reversed Scansaroli's conviction and remanded for a new trial. In this most recent opinion, the panel, while claiming to adhere to the *Mascuch-Goldstein* rule and to its own former determination that Scansaroli failed to move specifically to strike the offending specification, nonetheless concluded that Scansaroli "did enough" below to satisfy the "spirit" of the *Mascuch-Goldstein* rule.

Thus, this important case has now come down to the single question of what action is required to preserve for appeal the issue of the insufficiency of a specification in an otherwise valid multi-specification count. The answer, the Government respectfully submits, is: sufficient action to raise and to have determined by the trial court the issue whether the offending specification should be stricken prior to sending the count to the jury. If this is the test, then the Government respectfully submits that the record discloses no evidence whatever that its "spirit", much less its letter, was "satisfied" in this case.

The Government urges that this is an appropriate issue for *en banc* review. The panel's most recent opinion,

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* Rule 40(a) of the Federal Rules of Appellate Procedure provides: "No answer to a petition for rehearing will be received unless requested by the Court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

despite its seeming disclaimers, is at variance with the prior law in this Circuit requiring otherwise waivable errors to be brought to the attention of the trial court—an issue upon which this Court has more than once felt compelled to invoke *en banc* consideration. *E.g., United States* v. *Indiviglio*, 352 F.2d 276, 280 (2d Cir. 1965) (*en banc*; *per* Hays, C.J.), *cert. denied*, 383 U.S. 907 (1966). Moreover, given the frequency of multi-specification counts in false statement crimes, the issue is hardly *sui generis*, but rather may be expected to recur with frequency now that the panel's opinion has placed in doubt the prior requirement of an express, specific motion below. Although the panel's most recent opinion evidences an intent to preserve settled doctrine by limiting this case to its special facts, the pertinent facts do not seem very special and, in any case, the importance of the case overall and the attention focused on it make it unlikely that this Court's opinion will lack substantial precedential weight. Even if this were not so, it is a commonplace in the law that the impact of doctrinal aberration is felt far beyond the confines of the notionally sympathetic and unique case which spawns the aberration.

Furthermore, the panel's opinion also casts new burdens on the Government so far as pleading such crimes is concerned, and extraordinary burdens on trial courts in dealing with multi-specification counts. Finally, the panel's opinion raises troublesome questions about whether it is not disfunctional and contrary to the long-range efficient division of responsibility between district courts and appellate courts for a Court of Appeal to entertain on appeal a procedural question never properly put to the trial court and found not to be "plain error" by the Court of Appeals.

Statement of Facts

The facts of the case are set forth in some detail in the panel's first opinion (slip op. at 5166-5184). In a nutshell, NSMC booked contracts that were largely non-existent. At the outset of Peat's engagement, in August, 1968, Natelli and Scansaroli agreed to certify the booking of these contracts without adequately ascertaining their bona fides, with the result that NSMC's financial statements for its 1968 fiscal year (ending August 31, 1968) showed a healthy, and wholly fraudulent, profit. Over the course of the next months, Natelli and Scansaroli became increasingly aware that the financial statements they had certified were a fabrication; they feared that, if their prior negligence were discovered, they would lose their licenses to practice. Accordingly, they helped NSMC both to hide the fact that the contracts booked in 1968 had proven bad and also to continue to book still further fraudulent "contracts."

Specifically, when NSMC sought to acquire (with its artificially inflated stock) companies with genuine assets and earnings, Natelli and Scansaroli helped doctor the financial statements in the proxy statement sent to the shareholders of the companies to be acquired, so that any hint of NSMC's real condition was carefully concealed. In a fraudulent footnote designed by Natelli and Scansaroli that purported to reconcile the originally reported 1968 financial figures with the figures now reported, the contracts that had been booked in 1968 but had now proved bad were either ignored; or were subtracted, not from the financial figures of the parent NSMC, but from the assets and earnings of later-acquired companies; or were improperly netted with a non-existent tax credit—all in violation of generally accepted accounting principles and to the single end of totally concealing what had really occurred. Similarly, in a nine-months earning statement for the current year that, although

unaudited, was subject to Peat's approval and was prepared in pertinent part by Natelli and Scansaroli, the accountants permitted NSMC to show profits from both 1968 and 1969 contracts which they knew to be nonexistent. These included, among others, over $320,000 in bad contracts that an honest Peat accountant, Douglas Oberlander, had specifically recommended to Scansaroli be written off (the "Oberlander schedule")* and a fraudulent $820,000 "contract" from Eastern Air Lines (the "Eastern commitment") that had surfaced at about 3 A.M. at Pandick Press just in time to be substituted for a like "commitment" from Pontiac Motors that had proven illusory. As summarized in the panel's first opinion:

> "The proxy statement was filed with the SEC on September 30, 1969. There was no disclosure that [NSMC] had written off $1 million of its 1968 sales (over 20%) and over $2 million of the $3.3 million in unbilled sales booked in 1968 and 1969. A true disclosure, which was not made, would have shown that without these unbilled receivables, [NSMC] had no profit in the first nine months of 1969." (Slip op. at 5175).

The Court found ample evidence of Natelli's wilfull connivance in all of this. As to Scansaroli, the question was harder, the Court held, because his position was more ministerial, although, as the audit supervisor, he was not exactly an underling. The Court found that, as to the footnote, Scansaroli consciously participated in the falsification and concealment of matters that were within his own ken. As to the nine-months earnings statement, however, the Court found that Scansaroli's casting aside of the Oberlander schedule, while dubious, was

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* Scansaroli himself, six months earlier, had noted that the bulk of these contracts were no good. (See Government Exhibit 65-15 in Volume V of the Appendix to the record on appeal).

not sufficient, standing alone, to support conviction, and that Scansaroli's association with the booking of the Eastern commitment was ministerial and involved no duty on his part to ferret out and disclose the true facts.*

ARGUMENT

To preserve on appeal the issue of the submission to the jury of an insufficient specification in an otherwise sufficient count, the defense must move at trial with sufficient specificity that a responsible trial court will rule on the issue.

The primary reason for rules like the *Mascuch-Goldstein* rule requiring specific objection below in order to

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* The Government, for its part, has maintained since the outset that the proof against Scansaroli on the second specification cannot be broken down in this fashion into separate components viewed in isolation, but that, rather, the proof against him has to be viewed as a whole, with one otherwise ambiguous fact becoming less ambiguous when seen as part of a pattern. The Government would argue that, viewed overall, the proof discloses that Scansaroli and Natelli had a common aim to prevent disclosure in the proxy statement of the fact that the contracts they had booked in 1968 had subsequently proved bad, and that the disregarding of the Oberlander schedule, in which Scansaroli participated at least as much as Natelli, was just one further manifestation of this fraudulent purpose. It is "ambiguous" only if all the other acts by Natelli and Scansaroli to conceal other bad contracts are ignored. Similarly, the primary effect of the Eastern substitution, from the accountants' standpoint, was to cover up the fact that one of the biggest prior bookings, the Pontiac "contract," had proved bad. The fact that, in the particular instance of the Eastern switch, the discretionary judgments were Natelli's, should not operate to isolate that act from its context: simply one more act of concealment by both accountants to their mutual purpose of concealing their prior joint negligence. Indeed, they continued their fraudulent attempt at concealment at the trial itself, where both took the stand and offered exculpatory explanations for their conduct that the jury must have rejected as false in order to convict.

preserve all but the plainest points on appeal is obvious and fundamental: "The reason for requiring that specific objection be made is, of course, to give the judge an opportunity to correct the error and thus to avoid the necessity of further proceedings, possibly including a new trial." *United States* v. *Indiviglio, supra*, 352 F.2d at 280. This is fundamental to our jurisprudence in at least three respects: It maintains the checks and balances of the adversary system by leaving to the parties, rather than to the courts, the initial (frequently tactical) decision of which points to pursue and which to leave alone. It greatly increases the efficiency of trial procedure by permitting the correction of errors by the trial judge at the time of trial. And it preserves the appropriate division of responsibility between trial court and appellate court by leaving to the former the initial application of law to facts and leaving to the latter the correction of legal errors, if any, by the trial court.

All these policies apply with particular force, of course, where the underlying question is the sufficiency of the evidence: a mixed question of fact and law on which the trial court's on-the-scene determination is inevitably highly useful to the appellate court's review. Indeed, these policies are most pertinent of all in just such a case as this one, where the sufficiency of the evidence may differ as between the specifications of a single count, and where insufficiency as to one specification will not require a judgment of acquittal on the entire count. The importance here of this last consideration cannot be overemphasized, for the panel has concluded that Scansaroli's conviction was proper and reverses only because the record does not affirmatively establish that the conviction was based by the jury on the charge laid in the first specification of the count rather than the second.

In both its second and third opinions, the panel here appears to recognize that the *Mascuch-Goldstein* rule,

requiring a specific motion to strike an insufficient specification, is, and should be, the law of this Circuit. As the panel states in its most recent opinion:

> "Many convictions are denied appellate review for failure to call the alleged error to the attention of the trial court so as to enable it to consider correction before verdict. Otherwise appellate review would become a game of hindsight." (Slip op. at 914).

In its second opinion, the panel found that "No separate motion was made by Scansaroli to withdraw the earnings statement specification from consideration by the jury" (slip op. at 6298); and Scansaroli no longer contests this.*

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* Scansaroli's constantly varying claims on this appeal as to what motions he made below and the "real" reasons for them are reflective of the "gamesmanship" that characterized his approach to this issue both below and on appeal. Though the largest parts of Scansaroli's brief and reply brief on the original appeal were devoted to the question of sufficiency, he *nowhere* assigned as error the failure of Judge Tyler to withdraw the second specification from the jury. When, however, the Court of Appeals found that the evidence was insufficient only as to this specification and ordered Scansaroli to respond to the Government's claim on rehearing that he had not moved to strike the specification, Scansaroli flatly (and inaccurately) proclaimed that "In fact—and contrary to the government's assertion—a motion to strike the second specification was made [by Scansaroli]." (Scansaroli's Response to Government's Petition for Rehearing, pp. 2-3). When his bluff was called by this Court's finding, in its second opinion, that no such motion had been made, Scansaroli, without missing a beat, conceded as much but averred, in the affidavit of his counsel filed with his petition for rehearing, that "I made no 'separate' motion on Scansaroli's behalf because it would have been pointless to do so." (Affidavit of Charles Stillman, Esq., October 20, 1975, paragraph 6).

As this Court (with two Justices of the Supreme Court sitting specially) said of an analogous situation in *United States* v. *Manton*, 107 F.2d 834, 847-48 (2d Cir. 1939), *cert. denied*, 309

[Footnote continued on following page]

Yet, in its latest opinion, the panel raises the question of whether, nonetheless, Scansaroli may have done enough below "to satisfy the spirit of the *Mascuch-Goldstein* rule", slip op. at 918, and, giving play to the hindsight it elsewhere condemns, states:

> "On reconsideration, we agree that [i] the arguments of counsel for Scansaroli with respect to the sufficiency of the evidence, [ii] his motion to strike the evidence relating to the Eastern commitment (an essential part of the 'nine-months earnings statement' specification) and [iii] the *co-defendant's* specific motion to withdraw the specification on the nine-months earnings statement make this a close question." (Slip op. at 917) (emphasis in original).*

The Government respectfully responds that (A) the record does not suggest that any of the three items cited was even remotely directed at striking the second specification for insufficiency; and (B) in any event, the test for whether the "spirit" of the *Mascuch-Goldstein* rule is satisfied should be whether enough was done that a responsible trial court would have ruled on the issue, and the panel virtually concedes that such was not the case here.

U.S. 664 (1940): "It is fair to conclude that the introduction of the point now is a mere afterthought .... [I]t was not until counsel came to write a reply brief, by leave of the court after the argument was concluded, that really serious consideration was given to the matter or any reference made to the plain error proviso .... Plainly enough, counsel consciously and intentionally failed to save the point ...." See also *United States* v. *Williams*, 146 F.2d 651 (2d Cir.), *cert. denied*, 324 U.S. 876 (1945).

* In this, as in most of the other respects in which the panel's third opinion departs from its second opinion, the panel closely relies on the new arguments and allegations and previously uncited cases set forth for the first time in Scansaroli's petition for rehearing, to which petition the Government has not had an opportunity to respond.

(A)

[1] As to the first item mentioned by the panel—"the arguments of counsel for Scansaroli with respect to the sufficiency of the evidence"—it is difficult to discern what the Court refers to here, since not even Sansaroli's briefs have pointed to any such arguments as bearing on the present issue. More particularly, Scansaroli's arguments at trial accompanying his two sufficiency motions (Tr. 1334-38 and Tr. 2133-35, reprinted here as Appendix A) were generalized arguments about his lack of intent and responsibility that never even slightly distinguished between the first and second specifications. And although in the first argument Scansaroli did advert to the Oberlander schedule, in neither argument did he so much as mention the Eastern commitment, which, as the panel elsewhere has noted, was "an essential element" of the second specification. How, in short, can these generalized arguments be said to have invoked the "spirit" of the *Mascuch-Goldstein* rule, when the flat holding of those cases is that a generalized sufficiency motion directed at the count as a whole will not preserve an objection to the sufficiency of a particular specification? *United States* v. *Mascuch*, *supra*, 111 F.2d at 603; *United States* v. *Goldstein*, *supra*, 168 F.2d at 671.* As this Court has recently intimated in another context, if such a generalized motion were said to

* Indeed, in *Mascuch*, the defendant's sufficiency motion directed at the overall multi-assignment count was held inadequate to preserve for appeal the issue of the sufficiency of each assignment, *even though* the defendant, in arguing the sufficiency motion to the trial court, expressly argued that each and every one of the assignments was insufficiently proven. 111 F.2d at 603. The present case, in which Scansaroli never argued the insufficiency of the second specification even as part of his argument on some more general motion and in which the trial court never passed on the issue even when considering Scansaroli's general sufficiency motions, thus presents a much easier case, well within the borders of the *Mascuch* decision.

suffice, one would have to question the wisdom "of departing so far from the requirement of specific and reasoned objection to a particularly crucial piece of evidence." *United States* v. ***Frank***, 494 F.2d 145, 155 n.16 (2d Cir.) (Friendly, C.J.), *cert. denied*, 419 U.S. 828 (1974).

[ii] As for the second item—Scansaroli's "motion to strike the evidence relating to the Eastern commitment" (Tr. 1338-40, reprinted here as Appendix B)—this was, quite expressly, a motion challenging the admissibility of the Eastern evidence on the (faulty) grounds of lack of connection, which is very far removed from any motion challenging the sufficiency of the entire second specification on the grounds of failure to show guilt beyond a reasonable doubt. The motion was made following several other admissibility motions, and the only questions to which it was addressed were *agency* and *relevancy;* Judge Tyler responded by applying the appropriate standards—far different from standards and considerations he would have applied if called upon, by a motion to strike the second specification, to evaluate the sufficiency of the evidence as a whole on that specification. That this is the way everyone, including Scansaroli, understood the motion at the time is conclusively demonstrated by the fact that, in his original appellate briefs in this very case, Scansaroli challenged Judge Tyler's denial of his motion to strike as being based on improper standards of agency and admissibility (*e.g.*, Scansaroli's reply brief, p. 22)—an argument, incidentally, that the panel found meritless. Only now, two rehearings later, is this admissibility motion suddenly found to summon the "spirit" of a *Mascuch-Goldstein* sufficiency motion to strike a portion of the count.*

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* In this connection, the panel's reliance on footnote 12 of *Anderson* v. *United States*, 417 U.S. 211 (1974), is, as the panel's opinion itself seems to recognize, rather attenuated. In *Anderson*, all the parties had assumed that the sufficiency question was properly before the Supreme Court; it was the Court itself that,

[Footnote continued on following page]

[iii] The third item mentioned in the panel's opinion--*Natelli's* specific motion to withdraw the second specification (Tr. 1321-22, reprinted here as Appendix C)--cuts far more against Scansaroli's position than in favor of it. Natelli's counsel made the proper *Mascuch-Goldstein* motion as to his client, and it was just as properly denied as to his client. With this model in front of him, Scansaroli's counsel consciously chose not to make the same motion as to *his* client. There can hardly be clearer evidence of waiver. Indeed, as the panel stated in its second opinion, "The failure to move may have been dictated by tactical considerations on the theory of his able counsel that it is easier to attack a weak specification in the hope of a spill-over to the stronger one."* (Slip op. at 6298). See *e.g.*

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sua sponte, raised the question of whether it was, given the absence of proper motions in the trial court. Thus, if anything, the Supreme Court implicitly recognized that in the ordinary case such motions would be necessary before the issue could be raised on appeal. Moreover, contrary to what the panel here suggests, footnote 12 clearly states that what enabled the Supreme Court to consider the sufficiency question was *not* the making of an admissibility motion below, *but rather* the making below of a claim that the indictment was unconstitutionally vage because the Government had worded the indictment more broadly than the constitutionally permissible scope of the statute in order to survive a motion to dismiss for insufficiency. In short, the sufficiency question in the *Anderson* case was inextricably intertwined with the question of the constitutionally permitted scope of the indictment and statute there in issue, a question properly and specifically raised below; and, indeed, the Court was able to avoid ruling on a serious question as to the constitutional scope of the statute by holding that the evidence was sufficient to convict under any view of its breadth. 417 U.S. at 228.

* The Government continues to submit that such strategy considerations most consistently explain Scansaroli's failure to follow Natelli's lead in moving to strike the second specification. This is illustrated, among other ways, by the scant attention paid by Scansaroli's counsel to the first specification in his summation (see Tr. 2236) and by his objection (in which Natelli did not join) to asking the jury whether they could reach a partial verdict "as to either specification of fraud as to either defendant" (Tr. 2422).

United States v. *Pravato*, 505 F.2d 703, 705 (2d Cir. 1974); *United States* v. *West*, 494 F.2d 1314, 1315 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974).

In his petition for rehearing and accompanying affidavit, Scansaroli's counsel attempts to get around the natural consequences of this deliberate waiver by claiming that:

> "Natelli's counsel made the motion, and when Judge Tyler denied it, he specifically included Scansaroli in his ruling. . . . I made no 'separate' motion on Scansaroli's behalf because it would have been pointless to do so." (Stillman Affidavit, par. 6).

These assertions distort the record and misconstrue the law. After Natelli's general sufficiency motion was denied with an "[E]xception to *your client, Anthony Natelli*" (Tr. 1321), Natelli's counsel then made a specific *Mascuch-Goldstein* motion directed at the second specification, which, he noted, "is basically, as I read it, the Eastern Airlines allegation as well as the allegation with regard to the Oberlander work papers." Having already discussed Eastern, he turned his attention to the Oberlander part, his contention being that the testimony of the government's chief witness, Kurek, was that this episode was innocent, "Mr. Kurek testifying it was a decision that he and Scansaroli made in what he considered to be an honest effort to arrive at a resolution, a proper resolution of the problem." (Tr. 1322). Responding to this last comment, Judge Tyler stated: "The whole point is . . . that this was less than an honest effort and that Kurek and Scansaroli well knew by that time it was less than an honest effort." (Tr. 1322). It seems perfectly clear that Judge Tyler in making this reference to Scansaroli was simply responding to Natelli's claim that Natelli had been exculpated by Kurek's testimony that the decision was an innocent decision made by others than Natelli.

Even if this stray reference by Judge Tyler to Scansaroli could be read as a decision by him that Scansaroli was criminally culpable with respect to the Oberlander schedule, there was not a word here about the Eastern commitment, and Scansaroli would hardly be justified in drawing any inference that Judge Tyler, by this passing remark, was effectively denying as to Scansaroli a motion to strike the second specification for insufficiency. As this Court itself held, in its first opinion, Scansaroli may well have been culpable with respect to the Oberlander papers; but this was not enough, without a showing of culpability on the Eastern commitment as well, to send the second specification to the jury as to Scansaroli.

The fact is that, as soon as Judge Tyler had finished denying Natelli's various sufficiency motions, both general and specific, Scansaroli's counsel, in almost the very first words out of his mouth, immediately disclaimed the effect of these rulings as to his client, stating:

> "Mr. Stillman: . . . I think, your Honor, it is important that we bear in mind, and I don't mean to be presumptuous in making the statement, but that we bear in mind that each of the—the guilt as to each of these two men must be determined individually.
>
> "The Court: No doubt about that." (Tr. 1335)

It is only with the wondrous aid of hindsight and an adverse decision by this Court that Scansaroli's counsel has suddenly remembered that he regarded Natelli's sufficiency motions and Judge Tyler's denials as applying to Scansaroli as well.

In any case, it has certainly never been the law in this Circuit or elsewhere that it is enough to preserve a point for appeal that a defense counsel conclude in his own mind that it would be "pointless" to make a parti-

cular motion, especially a sufficiency motion. As this Court said of a parallel claim in *Williams* v. *United States*, 463 F.2d 1183, 1185 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972):

> "We are not impressed by the argument. Lack of probable success in raising an issue has seldom if ever precluded counsel from raising a question, ... and such a proferred 'justification' for not raising an issue . . . will certainly not preclude a finding of 'deliberate bypass' . . . ."

The most rudimentary principles of trial procedure demand that a party's counsel make the specific motion and give the trial court a chance to directly confront the problem, rather than leaving the matter to "interpretation" of some obiter dictum the Court may have uttered in respect to another party's motion.*

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* The panel's reference to footnote 1 of *United States* v. *Lefkowitz*, 284 F.2d 310, 313, n.1 (2d Cir. 1960) is wholly inapposite. In *Lefkowitz*, the Court reversed the conviction of all three defendants because of a legally deficient charge that shifted the burden of proof to the defendants; in the footnote, the Court noted that once two of the three defendants had objected to the charge, there was no need for the third to object as well, since they all stood in the same posture. In the instant case, by contrast, the very point of significance is that Natelli and Scansaroli stood in very different postures as to the second specification, so that Natelli's motion to strike the specification for insufficiency, which was properly denied, can hardly be said to suffice for Scansaroli, as to whom such a motion, if made, should have been granted.

Moreover, it is doubtful whether even Natelli properly preserved for appeal Judge Tyler's denial of Natelli's motion (made at the end of the Government's case) to strike the second specification for insufficiency, since he thereafter put in a defense case and did not renew his motion to strike the second specification at the close of all the evidence. It is, of course, settled that "By introducing evidence, the defendant waives his objections to the denial of his [sufficiency] motion[s]" at the close

[Footnote continued on following page]

In short, the Government respectfully submits that there is really no evidence at all in the record that Scansaroli, in some inarticulate fashion, made it "sufficiently clear to the trial judge that he wanted a judgment of acquittal or some equivalent on the 'nine-months earnings statement' specification." (Slip op. at 917). The record, carefully scrutinized, does not support the inference that he even raised the issue.

(B)

The dangers posed by the panel's most recent opinion go far beyond the confines of the present case. For the panel's conclusion that, even though Scansaroli did not do enough to bring the issue of the second specification to the trial court's attention, he nonetheless did enough to preserve the point on appeal, undermines the purpose and function of the settled rules of this Court, of which the *Mascuch-Goldstein* rule is but one manifestation, for the correction of errors at trial. Until the panel's most

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of the Government's case, unless he thereafter renews his motion at the close of all the evidence. *United States* v. *Calderon*, 348 U.S. 160, 164, n. 1 (1954). *Accord, e.g., United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 n. 7 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States* v. *Arcuri*, 405 F.2d 691, 695 n. 7 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969); *United States* v. *Larson*, 507 F.2d 385, 387 (9th Cir. 1974; per curiam) ("Such an unrenewed [sufficiency] motion is waived and any error in the denial of the motion is waived by the introduction of the accused's evidence."); *United States* v. *Robinson*, 487 F.2d 349 (5th Cir. 1973; per curiam); *United States* v. *Manos*, 340 F.2d 534, 536 (3rd Cir. 1965); *Battle* v. *United States*, 206 F.2d 440, 441 (D.C. Cir. 1953). See also IX *Wigmore on Evidence* § 2496 (3rd ed. 1940).

Indeed, to the extent that Scansaroli's own various motions and arguments made at the close of the Government's case can be said to somehow encompass a request to strike the second specification for insufficiency, he waived any objection to the denial of this "request" by failing to renew it after he put in his own case.

recent decision, it was fundamental to all such rules that the only sensible test of whether a waivable claim had been preserved for appellate purposes was *whether the party did enough below that the trial court could reasonably be expected to have ruled on the issue.* Even the most generous reading of the three items relied on by the panel and discussed above can hardly be said to have met this test. Indeed, the panel does not contend otherwise, but simply passes over the question by claiming that the "spirit" of the *Mascuch-Goldstein* rule was satisfied without analyzing the long-range ramifications of this approach. The fact of the matter is that, since Scansaroli did not do enough below to even focus the trial court's attention on the error now made the basis of reversal, then neither the spirit nor the letter of the *Mascuch-Goldstein* rule was met, because its primary purpose is the wholly necessary one of permitting trial judges to correct at trial errors which may otherwise require burdensome new trials of otherwise perfectly valid convictions. Thus, by finding that Scansaroli's motions below—which neither the trial court nor any of the parties viewed at the time as a request to strike the second specification as to Scansaroli—constitute a sufficient basis to raise the claim on appeal, the panel calls into doubt the continuing vitality of not only *Mascuch* and *Goldstein* but of all the rules of this Court resting on the very same foundation, most notably this Court's *en banc* decision in *Indiviglio, supra.*

No one, including the panel, has pointed to a place in the record where the trial court should have felt obliged, for whatever reason, to rule on the sufficiency of the second specification as to Scansaroli. As the panel concedes in a footnote to its present opinion: "We recognize that we cannot find fault with the distinguished District Judge, Harold Tyler, for not recognizing the various motions as a single request." (Slip Op. at 917, n.5). If the fault is not the trial court's, then surely it must be the

defendant's. If the trial court ruled properly on all that was before it, and if the defendant, at the end of the Government's case and throughout all the days of trial following it, chose not to make the simple motion necessary to enable the trial court to correct the error—or, perhaps, to make findings that would have aided this Court in determining that there was sufficient evidence after all on both specifications—the defendant should not now be the beneficiary of his own error, particularly since the Court has found that the evidence against Scansaroli is sufficient on the first specification to sustain his conviction. This only emphasizes what one Court has called "the unfairness of raising matters on appeal that were not called to the attention of the district court." *Defino Martone* v. *United States*, 396 F.2d 229, 232 (1st Cir. 1968). How, finally, even with the benefit of the hindsight that the panel elsewhere condemns, can the panel conclude that the "spirit" of the *Mascuch-Goldstein* rule was satisfied when the first and most obvious function of the rule, to bring the issue clearly before the trial court, was not complied with?

Thus, while paying homage to the continuing vitality of *Mascuch* and *Goldstein* and their progeny, the panel has utterly sapped them of their meaning by its holding here and, indeed, has done substantial violence to the sound principle upon which they and more recent cases such as *Indiviglio* depend. While apparently spurred to act "in the interests of justice" and not merely to apply the letter of the law, the panel has created a precedent which is far more likely to result in unjust appellate determinations, not least of all in this very case.*

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* From the question raised in the panel's first opinion as to "[w]hether it is important enough for the United States to retry [Scansaroli]" and the suggestion in its second opinion that "the District Judge who inherits the case ought carefully to con-

[Footnote continued on following page]

As for the future administration of justice, it will no longer be enough for conscientious, not to mention overburdened, trial judges to rule on the motions put to them; they will have to consider as well whether the motions of one party are intended to be motions for another, despite counsel's express disclaimers, and whether the arguments of counsel on one issue secretly invoke the "spirit" of wholly different issues.*

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sider a Rule 35 application to suspend the 10 days of jail time imposed," we draw the inference that the Court entertains the view that further proceedings against Scansaroli would be improvident. Most respectfully, we are at a loss to understand how the Court could possibly mean to suggest that this prosecution should be abandoned, when, to the extent relevant here, this Court has sustained the jury's finding that Scansaroli was *guilty* of criminal participation in a fraud which cost the public hundreds of millions of dollars and in which his actions were in criminal violation of the fiduciary responsibilities which the high calling he had voluntarily assumed imposed upon him.

* On the unfairness of this kind of ambush, Wigmore quotes with approval Lamm, *J.*, in *Bragg* v. *Metropolitan Street R. Co.*, 192 Mo. 331, 91 S.W. 527 (1905), as follows:

> "It has become a trite commonplace of the rules of appellate procedure that a general objection . . . may not be laid in the record below (to use a homely simile) as an egg to hatch later in the Appellate Court into precise and definite objections—objections the point to which was concealed from the trial Court and from opposing counsel, and first came out of ambush and into sunlight in briefs to this Court. . . . How could the [trial] Court tell, though he possessed the astounding wisdom of King Solomon himself (the mere view of which, 'inter alia,' took from the Queen of Sheba all her 'spirit,' 2 Chron. ix, 3, 4, q.v.), what precise objection the learned counsel had in mind? It has not hitherto been allowed to a 'nisi prius' judge—a 'puisne' judge—to have been so successful in
>
> 'Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances,'

[Footnote continued on following page]

The Government too will have to be on its guard for such hidden traps. Moreover, out of simple caution it will, in future false statement cases, have to allege each false statement in a separate count or risk the reversal of a conviction based on afterthoughts on appellate review. The panel, indeed, although holding the count properly drafted, positively suggests that such multiplication of counts "might be the better practice in cases like this where the incidents charged as in violation of a statute are discrete." (Slip op. at 917). It is hard to know what to make of this suggestion. In the present case, the crime charged was issuing a false proxy statement that deluded investors by portraying NSMC as a profitable company with a profitable history, whereas the defendants knew it was an unprofitable company with an unprofitable history, but they hid these facts. There was only one proxy statement and, on any practical view, one crime. Sound and fair pleading would therefore suggest one count. If it is the Court's suggestion that every false statement in the proxy that could have been proved through reference to a different, more or less discrete incident should have been charged as a separate count, then there would have been, not just two counts, but dozens. The booking of the Eastern contract would be one count. The booking of the Pontiac contract a second. And so forth.

—that he has the whole body of the law at his fingers' ends, so to speak, for instantaneous and automatic application, 'ex mero motu,' without having his attention directed by counsel to some specific legal principle or some specific fact controlled by such principle. Only Appellate Courts, it is modestly believed, are so endowed, and even this has been a subject of sharp discussion and possible doubt, and, peradventure, should be stated cautiously and taken 'cum grano salis.' . . . Trial Courts may not thus be convicted of error."

(I *Wigmore on Evidence* § 18 [3d ed. 1940] at pp. 337-38).

Whatever the ideal number of counts in this case, the thrust of the panel's opinion is to make the drafting of single or few count indictments a hazardous process indeed whenever more than one false statement is specified. In the ordinary perjury, false tax return, and, indeed, false proxy statement cases—where there are typically a great number of false statements contained in a single document or transcript—the Government will now have to charge each specific false statement as a separate count, spinning unwieldy, overbearing indictments from a single session of lying, or else risk reversal on appeal whenever the rule of *Mascuch-Goldstein* is deemed satisfied by the spirit of *Scansaroli.*

Finally, there is this: Implicit in the *Mascuch-Goldstein* rule is the realization that it is not plain error for a multi-specification count to go to the jury when one of the specifications later turns out to be insufficient. For, as against the possibility that the jury may convict on the weak specification stands the far greater probability that, in finding the defendant guilty beyond a reasonable doubt, the jury will almost certainly be finding him guilty on the specification(s) where the proof was ample.* This probability, coupled with the policies already mentioned in favor of bringing evidentiary questions to the attention of the trial court, fostering good pleading practices in the drafting of indictments, and avoiding re-trials based on objections conceived in hindsight and errors caused by the defendant's own omissions, have led the judges of this Circuit, prior to this case, to consider the submission to the jury of an insufficient specification as

* The situation is entirely different, of course, where the proof on the offending specification is ample but it should never have been submitted to the jury for some other, legal reason, such as its unconstitutionality. This is the situation in most of the Supreme Court cases referred to in the panel's various opinions.

a technical defect that is fully waived if not clearly brought to the trial court's attention by specific objection below.*

There are, in short, two categories of appealable errors: plain errors affecting substantial rights, and errors preserved for appeal by proper motions to the trial court that were improperly denied or ignored. Rule 52 Fed. R. Crim. Proc.; and See 28 U.S.C. § 2111. See also *United States* v. *Rose*, — F.2d —, Dkt. No. 73-2760, (2d Cir., November 19, 1975). Neither kind of error was present in this case, so that, as the panel acknowledges, there is presented "a difficult question of appealability." (Slip. op. at 914). Yet, glossing over this difficulty, the panel here purports to carve out a third category: situations where undefined "interests of justice" permit the Court to scour the record to find the "spirit" of a proper objection which was never made. Respectfully, the Government suggests that, in light of the Second Circuit's long standing recognition of, and respect for, the ability and sensitivity of trial judges in this district,

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* Indeed, as indicated at the footnote at pages 19-20, *supra*, the Supreme Court and numerous Courts of Appeals have held that the issue of the sufficiency of the evidence on the entire charge may be fully waived in the ordinary case by failure to make proper objection below. This is but a frank recognition of the fact that there is something quite extraordinary in an appellate court's finding, on the basis of arguments never clearly raised below, that there is insufficient evidence to find a defendant guilty, when the jury, having heard the evidence first-hand, had unanimously agreed that he is guilty beyond a reasonable doubt. The cases where appellate courts have invoked this extraordinary power to "second-guess" the jury (and the trial judge) have mostly been (unlike here) cases where the evidence of some element of the crime was not merely "insufficient" but wholly absent or where the appellate court only reached the sufficiency issue after concluding that large chunks of evidence submitted to the jury should have been excluded.

as well as the difficulties under which the Court of Appeals labors in assessing from a cold transcript the "spirit" of an objection,* the extraordinary exercise of discretion by the panel in its most recent opinion should be reconsidered. Most surely, the "interests of justice" do not warrant the *tour de force* required here to reverse the otherwise valid conviction of Scansaroli.

CONCLUSION

The Government's petition should be granted, and the judgment of conviction of Scansaroli should be affirmed.

Respectfully submitted,

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

JED S. RAKOFF,
JOHN D. GORDAN, III,
Assistant United States Attorneys,
Of Counsel.

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* As Judge Friendly, quoting Justice Frankfurter, said in *United States* v. *Kahaner*, 317 F.2d 459, 485 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963):

> "Absolute perfection in trials will not be attained so long as human beings conduct them; few trials of this length and difficulty can have been so nearly free of error as this one. . . . *In a case so long and hard-fought as this an appellate court must be careful lest 'the perspective of the living trial is lost in the search for error in a dead record.'*" (Emphasis supplied).

Accord, *United States* v. *Birnbaum*, 373 F.2d 250, 256-57 (2d Cir.) (Kaufman, C.J.), *cert. denied*, 389 U.S. 837 (1967) (adding: ". . . we must take care not to sit as a 'super jury' . . .").

APPENDIX

APPENDIX A

(1) Scansaroli's sufficiency argument at close of Government's case (Tr. 1334-38).

The Court: All right, Mr. Stillman.

Mr. Stillman: Yes, sir, your Honor. At this time on behalf of Joseph—I say at this time, obviously, assuming that this is the motion being deemed made at the end of the Government's case and I at this time move for a judgment of acquittal on behalf of Joseph Scansaroli for [1335] the following reasons:

I will try to be brief. I know that it is getting on.

The Court: Please do, because I am not, as I have tried to tell you gentlemen before, I have been sitting here. You don't have to expatiate in detail. You really don't.

Mr. Stillman: I appreciate that, sir. I think, your Honor, it is important that we bear in mind and I don't mean to be presumptuous in making the statement, but that we bear in mind that each of the—the guilt as to each of these two men must be determined individually.

The Court: No doubt about that.

Mr. Stillman: I think the evidence shows Joseph Scansaroli was employed by Peat, Marwick & Mitchell. That he was not the man who was in charge of making the decision. I think the evidence shows, your Honor, through the mouth of every witness who testified for the Government that any contact that witness had with Joseph Scansaroli was marked by open conduct on his part.

I think the whole affair of Oberlander, your Honor, reflects the fact that if Mr. Scansaroli was—had it in his mind to conceal something that occurred in 1968, that he could have done in August what he did in May,

APPENDIX A

(1) Scansaroli's sufficiency argument at close of Government's case

namely, [1336] to conduct that review by himself. I think the selection of Oberlander, a young man working in the firm reflects the fact that Scansaroli's mind was clear that he had nothing to be concerned about and he had Oberlander do this work.

The fact that he went on and spoke with Bernard Kurek concerning the matter and came to a resolution, your Honor discounts Kurek's testimony that so far as Kurek was concerned, I think it was a matter being discussed with two accountants, between two accountants. The fact of the matter is, if your Honor please, that as a result of that conversation, approximately one-third or about 30 per cent of the receivables which had been questioned by Oberlander were in fact written off by the company.

I think the evidence shows, your Honor, that throughout this matter when Johnny Johnston came over to speak, to look into this matter, and he was sitting next to Scansaroli we have Mr. Johnston's sworn testimony that Scansaroli was not concerned. He said go ahead, do whatever you have to do but do your work. When it came to developing a program to review the 19—the receivables at 8 31 1969 and Oberlander presented his work program to Mr. Scansaroli, he made but another suggestion as to a step to be taken so that Oberlander could satisfy himself that this was in fact a good asset.

[1337] I think if your Honor please, that the evidence overwhelmingly demonstrates the absence of any criminal intent whatsoever on behalf of Joseph Scansaroli. Whatever those charts show, your Honor, they do not show that the man acted with any kind of evil intent in anything that he did throughout the course of this matter.

APPENDIX A

(1) Scansaroli's sufficiency argument at close of Government's case

And I would respectfully defy the Government to come up with some reasonable evidence to demonstrate that Scansaroli had any evil intent whatsoever during the time from August of 1968 until October '69.

And even, your Honor, it is a small thing, but when he goes to work for the company, the evidence shows through Kurek that Scansaroli went there, he was a man willing to open up his mouth, if something bothered him, he would speak out about it. He doesn't go and suddenly jump in a bed with Kurek and with Randall whom we now know are confessed criminals. He continues to do his job as an accountant. I respectfully submit on the state of this record, it would be an injustice to let this matter proceed any further with respect to Joseph Scansaroli.

I respectfully urge you to dismiss it now.

The Court: Well, again, as I observed to Mr. Martin, I am well aware in addition to the matters you pointed to there are other matters which a fact finder could consider very much in favor of Mr. Scansaroli, but the inquiry [1338] here is somewhat more limited. I believe there is evidence from the Government's point of view, particularly documentary evidence alone, which might convince a reasonable jury that Scansaroli, well aware of what was going on, participated in this affair with an intent to defraud as the Government has claimed to this jury it will prove. And I think that's sufficient under the legal tests now pertinent in our circuit, so with all due respect, I deny your motion and plan to put the case to the jury.

(2) Scansaroli's sufficiency argument at close of defense case (Tr. 2133-35).

Mr. Stillman: Thank you. Of Course, your Honor, I adopt the motions made by Mr. Martin. In addition, of course, I move at this time for a judgment of acquittal now [2134] that all of the evidence is in with respect to Joseph Scansaroli.

I respectfully submit, your Honor, that the evidence clearly shows that a reasonable jury could not find beyond a reasonable doubt Joseph Scansaroli unlawfully, wilfully and knowingly participated in the acts charged in this indictment. I would direct your Honor's attention most respectfully to the uncontradicted fact that Mr. Natelli testified that each and every material decision which forms a basis for alleged criminal conduct, is a decision that he as the man in charge made.

I respectfully submit, your Honor, the evidence overwhelmingly shows Joseph Scansaroli as an employee doing his job to the best of his abilities. I submit that there's no evidence whatsoever that he was the guy who called the shots and, therefore, it just seems to me that it would be just terribly unfair to allow the jury to speculate with respect to him. I don't think the evidence supports it, your Honor.

The Court: I must say that treating as the law and common sense requires us to do, each defendant's case taken separately, I believe Scansaroli has somewhat of a good argument there. I would put it a little differently. I think the Government has proved over-

APPENDIX A

(2) Scansaroli's sufficiency argument at close of defense case

whelmingly stupidity and [2135] negligence on the part of that poor man and it may well be that the fact finder would find nothing else but that or, alternatively, that the fact finder will say, as you argue, well, Scansaroli himself continually tried to make clear, and there's some other evidence to support this, he was nothing but a functionary who made no decisions of consequences and left it all up to Natelli, et cetera.

I think either argument factually is supported in the record. There is also a point which I am going to charge this jury that perhaps the fact finder could very well say, well, good, but he was so careless and so negligent and so recklessly indifferent to relatively simple information in consequences that any accountant should know, maybe there's enough here to find the requisite criminal intent as we put it. It is a close question, I think frankly as to Scansaroli, as I see it. Certainly if I were the fact-finder, I would be more troubled with his case for a variety of reasons such as you and I have dilated upon. Nevertheless, I think perhaps there's enough to go to the jury. I'm going to deny your motion.

APPENDIX B

Scansaroli's motions to strike evidence at close of Government's case (Tr. 1338-40).

Mr. Stillman: Your Honor, at this time I would also like to move to strike the following evidence which your Honor received subject to connection.

The Court: I have already ruled that I am taking all that because I think there is sufficient connection.

Mr. Stillman: May I just for the record, your Honor, note the areas that I specifically have in mind and I will go through them very rapidly.

The Court: Sure.

Mr. Stillman: Transcript at page 149 and 150, conversation between Kurek and Randall.

Page—in which only the two of them were present.

211 to 218, conversation between Kurek and Randall, only the two of them present.

221 to 223, March 8, another meeting, Kurek and [1339] Randall, only the two of them present.

224, Exhibit 10A discussing a conversation between Mr. Natelli and Mr. Randall and apparently Kurek and Mr. Scansaroli not present.

233, conversation between—June 3, 1969, Mr. Natelli and Mr. Kurek. Mr. Scansaroli not present.

June 9, 1969, meeting of the Finance Committee. Scansaroli not present.

239, Exhibit 15, discussed at that meeting Scansaroli not present, no evidence he ever saw it.

245 to 246, some partial notes of that meeting.

The affair of the Eastern Airlines, if your Honor please, which came out of the printer. I believe the evidence shows Scansaroli left the printer and did not participate in the entire matter with respect to the booking of Eastern and I move to strike that.

APPENDIX B

Scansaroli's motions to strike evidence at close of Government's case

The Court: I assumed at the time and I still assume, it may well be that he wasn't even—even assuming he were within the printer's establishment, he was not privy to that conversation.

Mr. Stillman: Yes, your Honor.

The Court: But this is true with respect to all these items which you fairly stated, and my view is that they are clearly admissible because count 2 really charges a [1340] scheme, as I would put it, or as the Government would put it, obviously, that what was going on here is that management decided to insist on presenting a fraudulent picture through its proxy statement in order to support its program of aggressive acquisition of other companies, mergers and the like, and that finally the management tips overboard the good sense and judgment of the defendants or one of them here and that the defendants according to the Government's theory, further aided and abetted in this scheme which was primarily in the first instance at least management dominated.

Is that a fair statement of the Government's position?

Mr. Velie: Yes, your Honor.

The Court: Simplistic, to be sure, but fair, is that right?

Mr. Velie: I thought it was an excellent statement.

The Court: I think that the jury then can consider that. However, I can assure you, Mr. Stillman, I intend to charge this jury that they have got to focus on evidence which shows what the defendant in question did or said, not on what others said, in order to determine whether or not they had the requisite intent, knowledge and desire to participate and whether or not in fact they did participate.

APPENDIX C

Natelli's motion to strike the second specification (Tr. 1321-22).

The Court (after denying Natelli's general sufficiency motion):

Exception to your client, Anthony Natelli.

Mr. Martin: I also your Honor, would move to strike the allegations of paragraph 4 on the ground that that—

The Court: Paragraph 4, you are talking about count 2?

[1322] Mr. Martin: Yes, which is basically, as I read it, the Eastern Airlines allegation as well as the allegation with regard to the Oberlander work papers, there being no evidence that the Oberlander work papers, the decision on that was anything wrong; Mr. Kurek testifying it was a decision that he and Scansaroli made in what he considered to be an honest effort to arrive at a resolution, a proper resolution of the problem.

The Court: The whole point is, the Government wants to argue, and I think they can fairly from evidence in the case, that this was less than an honest effort and that Kurek and Scansaroli well knew by that time it was less than an honest effort.

Again, I understand you, but I don't think the Judge should dismiss when there is evidence which could convince a reasonable jury to the contrary of what you are saying.

Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JED S. RAKOFF, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 8TH day of JANUARY, 1976 he served ~~a copy~~ 2 copies of the within GOVT'S PETITION by placing the same in a properly postpaid franked envelopes addressed:

(1) Charles A. Stillman, Esq.
110 East 59th Street
New York, N.Y. 10022

(2) John S. Martin, Jr., Esq.
1290 Avenue of the Americas
New York, N.Y. 10019

And deponent further says that he sealed the said envelopes and placed the same in the mailbox drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jed S. Rakoff

Sworn to before me this
8th day of January, 1976

Mary L. Avent

MARY L. AVENT
Notary Public, State of New York
No. 03-4590237
Qualified in Bronx County
Cert. filed in Bronx County
Commission Expires March 30, 1977